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EXAMINER

LACYK, JOHN P

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Please find below and/or attached an Office communication concerning this application or proceeding.

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/804,391
Filing Date: March 18, 2004
Appellant(s): GUENST ET AL.

Kimberly S. Zillig
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 10/09/08 appealing from the Office action mailed 4/11/08.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

3,361,133	KIMBERLEY ET AL	1-1968
3,561,448	PETERNEL	2-1971
3,254,650	COLLITO	6-1966
3,916,875	TOCH	11-1975

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1, 4-10, 13, 15-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kimberley et al (3,361,133) in view of Collito (3,254,650) or Toch (3,916,875).

Kimberley et al discloses a device (see Figures 1 and 3) used to hold or clamp a blood vessel having a handle (5,6,7), a collar (1 and 2) that encircles the blood vessel, and the collar being connected to a vacuum port that is coupled to a vacuum source (6,7,9 and 10). The collar has an inner sleeve (13 and 14) that is made of a porous material such that when a vacuum is applied the porous material acts as a plurality of suction apertures to hold the blood vessel to the clamp. As shown in Figure 3, the collar is comprised of two collar halves that together form a cylinder. The handle (5,6,7) includes swingable arms (6 and 7) which are considered to be part of the handle as well

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as malleable at least to some degree. Kimberley et al discloses the claimed device except for specifically using a ring for encircling the collar halves to hold them together during use. Collito and Toch both teach that it is well known to use a ring type clamp (48) and (20), respectively, to hold two halves of a cylindrical device together within the body. Therefore a modification of Kimberley et al such that the collar is further held together using a ring would have been obvious to one skilled in the art in view of Collito or Toch which teaches that it is known to use such a ring type clamp to hold two halves of a cylindrical device together during use.

Claims 1, 4-10, 13, 15-17 and 24-31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Peternel (3,561,448) in view of Collito (3,254,650) or Toch (3,916,875).

Peternel discloses a device used to hold or clamp a blood vessel having a handle (80 and 108), a first and second collar (16 and 18), that encircles the blood vessel, and the collars being connected to a vacuum port that is coupled to a vacuum source. The collars have a plurality of passages or apertures (56) to allow fluid communication of the vacuum source to the blood vessel to hold the blood vessel to the clamp. As shown in Figure 3, the collars are comprised of two collar halves that together form a cylinder. The handle includes vacuum lines (96) which are considered to be part of the handle. Each arm (80 and 108) of the handle is considered to be first and second prongs that are attached to the first and second collars and are "malleable". Peternel discloses the claimed device except for specifically using a ring for encircling the collar halves

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together during use. Collito and Toch both teach that it is well known to use a ring type clamp (48) and (20), respectively, to hold two halves of a cylindrical device together within the body. Therefore a modification of Peternel such that the collar is further held together using a ring would have been obvious to one skilled in the art in view of Collito or Toch which teaches that it is known to use such a ring type clamp to hold two halves of a cylindrical device together during use.

(10) Response to Argument

Appellant argues that there is no expectation of success when combining the ring of Collito or Toch with the device of Kimberley et al. The Examiner's position is that there would in fact be an expectation of success with the combination. The purpose of the Kimberley et al device is for the two halves to be closed during use in order to operate properly, the addition of a ring, as taught by Collito or Toch, would provide added securement to further ensure the device maintains a closed position while in use, which is what the expectation would be, therefore there would be an expectation of success with the combination. Appellant also argues that Kimberley et al teaches away from the combination and making such a combination would destroy the functionality of the Kimberley et al device. The Examiner disagrees with this statement since the function of the Kimberley et al device is to apply the device in an open position to load a vessel within, close the device and use the device while in a closed position to apply a vacuum to the vessel to hold it within the device. The addition of a ring would not change or destroy the functioning of the device at all and would only provide an

additional securement means to further ensure that the collars maintain a closed position while in use. Appellant also argues that there is no motivation to modify the Kimberley et al device, as discussed above, the motivation for the modification would be to further ensure that the device remains in a closed position during use.

With respect to claims 7 and 16, Appellant argues that the handle of Kimberley et al is not "malleable". The examiner disagrees with this argument in that the definition of malleable is "1) capable of being shaped or formed, as by pressure or hammering 2) capable of being altered or influenced" and as such the handle of Kimberley et al is considered to be "malleable".

With respect to claims 9 and 17, Appellant argues that the air-line tubes (9,10) are not incorporated into the handle (5). The Examiner's position is that the vacuum line in Kimberley et al includes all of elements 9,10 and 6,7 and in looking at Figure 1 at least elements 6 and 7 as well as the connection between 6,7 and 9,10 is part of the handle such that it is considered to be "incorporated" into the handle (5) and therefore meet the claimed language.

Appellant further argues that the Peternel reference teaches away from the combination with Collito or Toch and that there is no motivation to combine the references. The Peternel device functions similarly to the Kimberley et al device in that the two halves of the collar are in an open position to load a vessel within and then closed and used in a closed position to apply a vacuum to the vessel to hold it while in a closed position. The device must maintain a closed position to operate properly and the addition of a ring would add a further securement means to ensure the device stays

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closed during use. As discussed above with respect to the Kimberley et al and Collito or Toch combination, the motivation for the combination is to further insure that the device remains in or maintains a closed position during use and the addition of the ring of Collito or Toch further ensures that the device maintains such a position during use.

With respect to claim 24 Appellant argues that Peternel does not show the first collar separated from the second collar by a first distance. As can be seen in Figure 2 the first and second collars (16,36 and 18,38) are separated by a first distance being the ends of the blood vessel (20 and 22) that are between the ends of the first and second collars. Appellant argues that the device holds the vessels in the position in which they contact each other and are not spaced apart from one another. However while the device allows for the two separate vessels are brought together and abut one another the first and second collars are spaced apart by a first distance being the distance of the two vessels (21 and 22). The claim states that the collars are spaced apart and not the vessels.

With respect to claims 7, 16 and 26 Appellant argues that the handle is "malleable". As discussed above with respect to the handle of Kimberley et al, the handle of Peternel is considered to be "malleable".

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

John P. Lacyk

/John P Lacyk/

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